



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-92-27

FACTS:

You are an elected, uncompensated member of the ABC Regional High School Committee (Committee). The ABC Regional School District (District) comprises the Towns of A, B and C. You represent the Town of A on the Committee. You are also the President of a construction company (Company). The Company, a Massachusetts-based corporation, is wholly owned by a holding company which in turn is owned by you and your brother (you own 50% of the holding company). The Company currently bids on many projects of various state agencies and most of the cities and towns in your county. The Company is interested in submitting a bid proposal for the removal of a fuel tank at the regional high school. The District's business manager will open and review the proposals and award the job to the lowest bidder. The Committee will ratify the contract award. You will not participate as a Committee member in this matter.

QUESTION:

Given your position on the Committee, can the Company enter into a contract with the District?

ANSWER:

No, unless the position of Committee member is designated as a special municipal employee position by the boards of selectmen of each of the member towns and you avail yourself of the exemption provided in G.L. c. 268A, §20(d).

DISCUSSION:

As we have decided on this date in *EC-COI-92-26*, regional school committees will no longer be considered independent municipal entities for purposes of G.L. c. 268A, but rather instrumentalities of each member municipality. As a member of the Committee, you therefore are a municipal employee of each of the member Towns.^{1/}

Section 20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, unless an exemption applies.

If the Company were to enter into a contract with the District, by virtue of your 50% ownership of the holding company, you would have a financial interest in a contract with a municipal agency (the same municipal agency in which you serve). See *EC-COI-89-22*. Section 20 prohibits such a financial interest unless an exemption applies.

Under §20(b), a municipal employee is not subject to the prohibitions of §20 provided, among other things, that the municipal employee does not participate in or have official responsibilities for any of the activities of the contracting agency. In your proposed situation, this exemption would not apply because the Company seeks to enter into a contract with the same municipal agency for which you have official responsibility.

Section 20, however, contains several additional exemptions which apply only to special municipal employees. The position of regional school committee member may be designated as that of a special municipal employee, if so classified by vote of the board of selectmen or city council of each of the member municipalities.

This result follows the analysis of *Commission Advisory No. 5*, where we explained that local water and fire district employees (where the district was contained within the boundaries of a single municipality) could be

designated by the single municipality's board of selectmen or city council as special municipal employees, even though the selectmen or city councillors might not be involved in any way with the activities of the district.

We now extend this analysis (*Commission Advisory No. 5*) to regional districts containing more than one municipality, with regard to the designation of their employees as special municipal employees. We recognize that this analysis is inconsistent with our opinion in *EC-COI-87-2* where we held (in apparent contradiction to *Commission Advisory No. 5*) that members of a fire district prudential committee (located within a single municipality) were **not** eligible for classification as special municipal employees.^{2/} However, we find that our current analysis is more appropriate in light of the recent decision by the Appeals Court in *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 428, n. 5 (1992). See *EC-COI-92-26*.

If members of the Committee are designated as special municipal employees, you may avail yourself of the exemption provided by §20(d). Under that exemption a special municipal employee is exempt from the prohibition of §20, if he files with the appropriate clerk a disclosure of his interest in the contract and if the board of selectmen approves of the exemption. Therefore, as a special municipal employee in your Committee position, you would need to file with the District Clerk a written disclosure of your interest in a contract with the District. Moreover, you would need to receive the approval of the boards of selectmen of each of the member towns.

To summarize, in order for the Company to enter into a contract with the Committee, you must obtain from the selectmen of each member town (a) the designation of Committee members as special municipal employees; and (b) an exemption from the boards of selectmen pursuant to §20(d).^{3/}

Date Authorized: September 10, 1992

^{1/}"Municipal employee," a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution. G.L. c. 268A, §1(g).

^{2/}In 1990, the Legislature amended G.L. c. 48 to add §90, which states that a fire district shall be considered a municipal agency and that part-time firefighters and any one who performs professional services for a fire district on a part-time, intermittent or consultant basis shall be considered a special municipal employee. St. 1990, c. 262. The Legislature simultaneously amended G.L. c. 268A, §20(d) to allow part-time employees of a fire district to avail themselves of the exemption provided by that section if approved by the fire district's prudential committee. This history further suggests moving away from our analysis in *EC-COI-87-2*.

^{3/}We note that if the Company wishes to enter into a contract with any of the towns encompassed by the District (or any agency of any of the towns), you could qualify for the exemption provided by §20(c) once you have obtained special municipal employee status. Section 20(c) allows a special municipal employee to have a financial interest in a contract with a municipal agency without seeking the approval of the board of selectmen, so long as the municipal employee does not participate in or have official responsibility of any of the activities of the contracting agency. In your case, it is unlikely that the Committee participates in or has official responsibility for any of the activities of any of the other agencies of the member municipalities. Therefore, if you become a special municipal employee, you would need only file a written disclosure of your financial interest with the District Clerk and the Town Clerk upon contracting with agencies other than the Committee.